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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

EXCEPTIONS OF BASIN ELECTRIC POWER COOPERATIVE TO SECOND INTERIM REPORT OF SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

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EXCEPTIONS

1. Basin Electric Power Cooperative (Basin)[1] excepts to the failure of the special master to recom-

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[1] Basin is the operator and, with five other consumer owned electric utilities, the owner of the Missouri Basin Power Project (MBPP), the facilities of which include the Grayrocks Dam and Reservoir located on the Laramie River in Wyoming about 10 miles above its confluence with the North Platte River. The other participants in the MBPP are Tri-State Generation and Transmission Cooperative; the Lincoln Electric System, owned and operated by the City of Lincoln, Nebraska; the Western Minnesota Municipal Power Agency; Heartland Consumer Power District; and the Wyoming Municipal Power Agency. The MBPP

mend that Wyoming be granted summary judgment dismissing Nebraska's claim that Wyoming is violating her rights under the decree by "[d]epleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River."

2. Basin excepts to the failure of the special master to recommend that Wyoming be granted summary judgment dismissing Nebraska's claim that Wyoming is violating her rights under the decree by "[d]epleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte Rivers."

3. Basin excepts to the failure of the special master to recommend that Wyoming and Colorado be granted summary judgment that all of the waters of the Laramie River are apportioned between them by the decree in *Wyoming v. Colorado*[2] and that Nebraska has no right to Laramie water under the decree in this case, except such as actually reaches the North Platte.

4. Basin excepts to the failure of the special master to recommend that Wyoming and Colorado be granted

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participants and their member distribution systems serve more than 1,200,000 people in Colorado, Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota and Wyoming. Grayrocks Dam and Reservoir provide cooling water for MBPP's Laramie River Station, a 1500 megawatt thermal electric generating plant. The MBPP is one of the major power suppliers in the region of the northern and central great plains and its transmission system is interconnected with all the major utility systems, public and private, that serve or connect in the eight state area served by MBPP's member systems.

[2] 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *decree vacated and replaced*, 353 U.S. 953 (1957).

summary judgment that Nebraska has no right under the decree in this case to any of the natural flow of the North Platte above Tri-State Dam, except such as she is entitled to divert in accordance with paragraph V of the decree into the canals named in paragraph IV for the irrigation of lands in Nebraska thereunder.

BRIEF IN SUPPORT OF EXCEPTIONS

Introduction

This is a simple case involving a straightforward decree that has taken on a patina of complexity because of the efforts of Nebraska to transform it from an enforcement action into an apportionment action and of the failure of the special master to observe the distinction between such actions and to confine the case to the issues presented by the claims actually pleaded by Nebraska.

Nebraska asked and was granted leave by the Court to file the petition herein on the strength of her assurance that she sought only to enforce the decree as it stands and not to modify it in any way. Wyoming opposed Nebraska's motion for leave to file on the ground that Nebraska had made no such showing of injury as the Court requires to exercise its original jurisdiction to entertain an action between states. Nebraska responded by saying:

> Each of Nebraska's allegations involves present or threatened interference with its apportionment established by the court in this case. Nebraska does not seek to modify the Decree in any respect, but only to enforce it pursuant to the Court's express anticipation

> of the need to do so. We do not propose to litigate anything new, but simply to protect what the Court has already decided.[3]

In paragraph 3 of her petition, Nebraska alleges that Wyoming is violating her rights under the decree by:

> a. Depleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River, a tributary of the North Platte River;
>
> b. Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte Rivers;
>
> c. Depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and
>
> d. Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate canal for

[3] Neb's Reply to Wyo's Brief in Opposition 2 (Jan. 15, 1987), Master's Docket Document No. (Doc. No.) 4. Notwithstanding this representation, Nebraska subsequently attempted to amend her petition so as to seek amendment of the decree to increase her apportionment. The Court denied her motion for leave to amend by order of March 7, 1988, 485 U.S. 931, Doc. No. 59. On October 10, 1991, Nebraska filed a second motion for leave to file an amended petition to seek a new apportionment, Doc. No. 407, which is now pending.

> storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.[4]

Thus the case the Court granted Nebraska leave to file and referred to the special master is limited to enforcement the existing decree and is founded on four specific allegations of violations of her rights under the decree.

Saying that "[s]ince 1986, the parties' positions have evolved," the special master suggests that Nebraska's claims are now "somewhat different from the literal claims of the initial pleadings." Second Int. Rep. 5; *see also id.* at 17 ("During the years since 1986, Nebraska's stance has evolved, and she now claims that Grayrocks operations will not harm her apportionment if Wyoming allows them to proceed in accordance with a 1978 Settlement Agreement . . ."). Since the Court has authorized no amendment of Nebraska's petition, Basin submits that judgment must be rendered on the claims she pleaded, not on supposed "evolutions" thereof. That Nebraska has changed positions in these proceedings as frequently as a weather vane in an errant wind, *see, e.g.,* Second Int. Rep. 17, 37, 80-81, does not entitle her to consideration of claims different from those the Court authorized her to file.

There would be little left of the rule that leave of the Court is required to file or amend a complaint in

[4] Neb's Petition for Order Enforcing Decree 2 (Oct. 7, 1986), Doc. No. 1. Basin is not involved in the allegations of subparagraphs c and d or in the issues arising thereunder and treated under the headings "Deer Creek Project" and "Inland Lakes," and takes no position with respect to them.

a case within the Court's original and exclusive jurisdiction, *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973), if the claims in a complaint the Court once authorized to be filed could thereafter "evolve," without the Court's supervision, into different claims. Because leave of the Court would be required to amend the petition here, Rule 15, Fed. R. Civ. P., is not applicable. Even if it were, Wyoming certainly has not consented, expressly or impliedly, to the trial of any claims not contained in Nebraska's petition. To the contrary, she has insisted that the parties be confined to the claims made in their pleadings. *See, e.g.*, Transcript of October 1, 1987 Hearing 38 (Oct. 8, 1987), Doc. No. 29.

Argument

An action to enforce a decree involves only previously established rights, not "equities," and construction of the rights of the parties is a matter of law, not of fact.

When it was shown early on without dispute that Nebraska is a party to an agreement with Basin and others providing for the operation of the Missouri Basin Power Project, including Grayrocks, and for the operation of the Corn Creek project, should it ever be built, the special master should have recommended that summary judgment be granted forthwith to Wyoming on Nebraska's claims 3.a and 3.b. Nebraska simply cannot be heard to say that operations she agreed to by contract with Basin constitute violations by Wyoming of her rights under the decree.

An action to enforce an existing decree is fundamentally different from an action to obtain an apportionment in the first instance or to alter an apportionment previously made. That the Court re-

tains jurisdiction under paragraph XIII to amend the decree *in an action authorized for that purpose* is undisputed. But it authorized no such action here. If by the statement that "[t]he current proceedings are before the Court pursuant to the 'changed conditions' or 'reopener' provision of the Decree under which the Court retained jurisdiction for the purpose of any 'order, direction, or modification of the Decree,' " Second Int. Rep. 4, the special master means to imply that the decree has been opened to modification in this proceeding, he is mistaken. Paragraph XIII is not even necessarily implicated in this action. While the inclusion of such a provision may be required to retain jurisdiction to modify a decree, to obviate what would otherwise be its effect as *res judicata*, it is not essential to the retention of jurisdiction to enforce a decree, which is an inherent concomitant of judicial power and requires no specific articulation to persist.

In *Virginia v. West Virginia*, 246 U.S. 565 (1918), the Court says:

> That judicial power essentially involves the right to enforce the results of its exertion is elementary. And that this applies to the exertion of such power in controversies between states as the result of the exercise of original jurisdiction conferred upon this court by the Constitution is therefore certain.

Id. at 591 (citations omitted). Thus, paragraph XIII of the decree is not essential to the Court's jurisdiction here.[5]

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[5] Where the Court has retained jurisdiction to modify a decree, as it has here by paragraph XIII, it is reluctant to do so except

The special master steps off on the wrong foot by suggesting that "equitable principles" and "the body of equitable apportionment jurisprudence set forth in the opinions of the Court dealing with other interstate water disputes," Second Int. Rep. 15, are of central importance in a case for enforcement of an existing decree. His report is heavy with references to the supposed "equities" of Nebraska, *see, e.g., id.* at 18, 37, 38, 64, 86, 87 n.100 and text above, 88, 91, notwithstanding that this case is concerned only with her rights.

There is a qualitative difference in the showing a state is required to make to be permitted, on the one hand, to seek simply enforcement of a decree as it stands and, on the other, to seek an apportionment in the first instance or the alteration of an existing apportionment. And the issues in a case to apportion or reapportion interstate waters are essentially different from those in a case to enforce a decree.

Where a state shows that a sister state is violating the provisions of an existing decree, she is entitled to enforcement whether or not she is otherwise injured. *Wyoming v. Colorado*, 309 U.S. 572, 580-81 (1940). But, both as a matter of pleading and proof, the showing a state is required to make to invoke

for the most compelling reasons. Rights settled by a decree, even if not strictly *res judicata*, are ordinarily entitled to repose. *Arizona v. California*, 460 U.S. 605, 618-626 (1983). Claims for reapportionment on the basis of changed conditions and new equities can be heard only in an action authorized by the Court for that purpose and are without the ambit of a proceeding, such as the instant, authorized solely for the purpose of allowing the plaintiff to enforce a decree.

the Court's original jurisdiction to obtain or alter an apportionment is much greater.[6]

The issues in an action to enforce a decree are essentially different from those in action to apportion the waters of an interstate stream in the first instance or to reapportion waters previously apportioned. The ascertainment and balancing of equities is the heart of a case to apportion or reapportion interstate waters. But the entry of the decree in such a case transforms what the Court determines to be the prevalent equities into legal rights which, thereafter, are enforceable as any other rights. The decree moots further consideration of equities until such time, at least, as the Court grants leave to one of the parties to seek its modification. *Cf. Colorado v. Kansas*, 320 U.S. at 393-94. The issue in an enforcement

[6] *Colorado v. Kansas*, 320 U.S. 383, 393 (1943). The plaintiff "must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor," *Alabama v. Arizona*, 291 U.S. 286, 291-92 (1934), and "must prove by clear and convincing evidence some real and substantial injury or damage." *Idaho v. Oregon*, 462 U.S. 1017, 1027 (1983). "Before the court will intervene the case must be of serious magnitude and clearly proved." *Colorado v. Kansas*, 320 U.S. at 393. *See also Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982); *Washington v. Oregon*, 297 U.S. 517, 522 (1936); *Connecticut v. Massachusetts*, 282 U.S. 660, 669, 672 (1931); *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); *New York v. New Jersey*, 256 U.S. 296, 309 (1921); *Missouri v. Illinois*, 200 U.S. 496, 520 (1906). The same standards apply to a state seeking leave to amend. *Ohio v. Kentucky*, 410 U.S. at 644.

The special master's refusal to apply these standards to Nebraska, Second Int. Rep. 13, reflects his failure to grasp that, as to the Laramie and below Tri-State issues, Nebraska is seeking, in the guise of enforcement, to reopen the decree to secure a reapportionment.

action is whether the defendant state is violating the rights of the plaintiff defined in the decree, and the construction of such rights is a matter of law. *Wyoming v. Colorado*, 309 U.S. at 581-82.

Stripped of the veneer of complexity with which it has been overlaid in the proceedings before the special master, the decree in this case is a simple structure. Its aim, in so far as Nebraska is concerned, is to provide her with sufficient water from the natural flow of the North Platte River during the irrigation season (May 1 to September 30, inclusive, of each year) to irrigate specified quantities of land under specified canals headed in the stretch of the river between Guernsey (or Whalen) and Tri-State Dams. To accomplish this, it apportions the natural flow in this section during the irrigation season 75% to Nebraska and 25% to Wyoming. To secure flows into this section, it places restrictions on upstream diversion and storage by Colorado and Wyoming.

Regardless of the refusal of Nebraska and the special master to face up to the fact, *see* Second Int. Rep. 94-95, Wyoming and Colorado cannot be found to have violated Nebraska's rights under the decree unless it be shown that they have done something they are forbidden to do, or have failed to do something they are required to do by the decree. The special master acknowledges that Nebraska has made no such showing. *Id.* at 94-95, 100.

The essential error that has infected the special master's approach to this case from the beginning, and that permeates his current report, is his failure to appreciate the distinction between a proceeding to enforce an existing decree and a proceeding to secure an apportionment. He has failed to come to grips with

the fact that *the case* the Court granted Nebraska leave to file[7] and referred to him[8] is to permit Nebraska to enforce the decree, if she shows it is being violated, not to permit her to present "equities" in aid of modifying it. He has failed also to recognize that construction of Nebraska's rights under the decree is a matter of law.

In his letter of April 9, 1992, to Justice White, p. 6, Doc. No. 464, Special Master Olpin recommends against the Court's granting Nebraska's motion of October 10, 1991, Doc. No. 407, for leave to amend her petition to seek a further apportionment because she "has not yet shown threatened injury that is of serious magnitude and imminent." He variously makes the same point in his current report. *See* Second Int. Rep. 64 ("the record is at this juncture 'inconclusive in showing the existence or extent of actual damage to Nebraska.' "), 94 ("Nebraska's as yet unseen evidence of injury or threatened injury to her interests"), 100 ("Nebraska . . . thus far has not pointed to evidence of specific harms or specific actions by Wyoming that are alleged to have caused or that threaten such harms."). Even if this were a case for reapportionment where equities of Nebraska in the Laramie and return flows below Tri-State not previously recognized by the Court might be considered, rather than a case for enforcement, the failure of Nebraska at this late stage yet to have shown a threat of serious injury would entitle Wyoming and Colorado to summary judgment in relation to Nebraska's Laramie and east-of-Tri-State claims.[9]

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[7] Order of January 20, 1987, 479 U.S. 1051, Doc. No. 4a.

[8] Order of June 22, 1987, 483 U.S. 1002, Doc. No. 20a.

[9] Nebraska has stated that only she can define the injuries

Points on Exceptions

1. Wyoming is entitled to summary judgment dismissing Nebraska's claim that the operation of Grayrocks Reservoir violates her rights under the decree.

When construction of the Missouri Basin Power Project (MBPP) was well advanced, Nebraska joined on two actions against agencies of the United States in the federal district court in Lincoln, Nebraska. The first was filed in November, 1976, against the Rural Electrification Administration, which had agreed to guarantee loans for the project. This action challenged the sufficiency of REA's final environmental impact statement and sought issuance of an injunction prohibiting REA from assisting the MBPP until the alleged deficiencies were cured. The second challenged the issuance by the Corps of Engineers of a 404 permit for Grayrocks Dam and sought to invalidate the permit on the grounds of alleged violations of the National Environmental Policy Act, the Federal Endangered Species Act, and the Corps' regulations. The two actions were consolidated and included several environmental organizations as additional plaintiffs, and Basin as an additional defendant. *Nebraska v.*

she apprehends below Tri-State from "proposed development in Wyoming to equities that rely on the apportionment at Tri-State," and acknowledged that she bears the burden of establishing her below-Tri-State "equities" and the substantial nature and serious magnitude of the injuries she fears. Transcript of May 12, 1989 Status Conference 96-98, Doc. No. 136. Implicit in this is recognition by Nebraska that by her east-of-Tri-State claims she seeks not enforcement of the decree but a new apportionment, since no showing of injury is required simply to enforce a decree, *Wyoming v. Colorado*, 309 U.S. at 380-81, and the standard of proof she admits she must meet is that applicable to apportionment actions.

REA, 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978), *vacated and remanded*, 594 F.2d 870 (8th Cir.1979).

After intensive negotiations spanning a period of 30 months, the last twelve of which were devoted almost entirely to reaching agreement on how the burden of Corn Creek's draft on the Laramie will be shared between Basin and Nebraska if the project is built, a settlement agreement was executed on December 4, 1978.[10]

The settlement agreement places limitations on the amounts of water the MBPP may consume and store and obligates the project to release specified amounts of water from Grayrocks Reservoir year round for the benefit of Nebraska. *See* Second Int. Rep. 65-69 & n.87. Basin acknowledges that it is obligated to assure delivery into the North Platte of the quantities of water called for by the settlement agreement regardless of anything Wyoming might do in the future (such as permitting additional diversions between Grayrocks Dam and the mouth of the Laramie). Basin's Memo. in Support of Wyo's Second Mot. for

[10] The settlement agreement, the stipulation of counsel for dismissal of the litigation, and the orders of the court of appeals and the district court effecting dismissal and reserving jurisdiction, are set forth in the Appendix to Wyoming's Brief in Opposition to Nebraska's Motion for Leave to File Petition A-20 thru A-36 (Dec. 18, 1986), Doc. No. 2. The concurrence of the Secretary of the Interior and the formal decision of the Endangered Species Act Committee exempting Grayrocks from the Endangered Species Act are set forth in the Appendix to Basin's Motion for Leave to Intervene A-1, A-4 (April 13, 1987), Doc. No. 14.

Summ. Judg., App. D (McPhail affidavit ¶ 7) (Feb. 28, 1991), Doc. No. 293.[11]

Nebraska makes no bones that her decision to go after Laramie water by holding the MBPP hostage under the federal environmental laws, rather than by seeking to reopen the decree in this case against Wyoming, was carefully calculated.

> At the time, consideration was given by Nebraska officials to reopening the Court's retained jurisdiction under Paragraph XIII of the Decree. Instead of petitioning the Court to reopen, however, the State of Nebraska sought to protect its apportionment by joining the Fish and Wildlife Service [sic][12] and the National Wildlife Federation in a suit under Section 7 of the National Environmental Protection Act, 16 U.S.C. Section 1536, to enjoin the construction of Grayrocks because it would cause a reduction in North Platte flows and would have adversely affected the critical habitat of whooping cranes 300 miles

[11] On the basis of his conclusion that Nebraska has "equities" in Laramie water, Second Int. Rep. 64, the special master recommends that the Court make relief available to Nebraska "to prevent any injuries that could attend Basin's inability to comply with flow releases under the 1978 Settlement Agreement by reason of Wyoming's administration of her water laws." *Id.* at 69. This, of course, assumes that Nebraska has rights to Laramie water as against Wyoming, one of the principal issues in the case.

[12] The Fish and Wildlife Service was not a party to the litigation. The federal parties were the Corps of Engineers and the Rural Electrification Administration, who were parties defendant and were represented by the Department of Justice.

> downstream in Nebraska. Nebraska reasoned that if the North Platte flows were maintained to protect the whooping cranes, the Central Nebraska [Public] Power and Irrigation District's interests in the apportionment established in this case would also be protected.[13]

Professor Tarlock observes that Nebraska pursued this course because she "discovered that downstream irrigators on the Platte River could be better protected under the wing of the endangered whooping crane than by litigating the allocation of the river under . . . the doctrine of equitable apportionment." Tarlock, *Law of Water Rights and Resources*, § 9.06[4][c] at 9-36 (Clark Boardman Co. [rel #3] 1991).[14]

[13] Neb's Reply to Wyo's Br. in Opposition 3 (Jan. 15, 1987), Doc. No. 4. In the same pleading, she stated that the settlement provided for minimum instream flows and "collaterally" protected "Nebraska's apportionment." *Id.* at 4. Augmentation of the water supply for the Central Nebraska Public Power and Irrigation District continues to be Nebraska's real aim. She anticipates that, as a condition of relicensing by the Federal Energy Regulatory Commission of the Kingsley Dam project located in Nebraska about 200 miles downstream from Wyoming, the district is going to be required to release more water for the benefit of the wildlife habitat in the Big Bend reach of the Platte River below its confluence with the North Platte and about 300 miles downstream from Wyoming. She covets Wyoming's water to slake the thirst the district apprehends. *See* Basin's Memo. in Opposition to Neb's Mot. for Leave to File Amended Pet. 8-9 (Nov. 12, 1991), Doc. No. 412.

[14] Given that, by her own admission, Nebraska made a calculated decision to secure Laramie water by using the federal environmental laws to hold up the MBPP, rather than by at-

Until 1984 Nebraska did not permit water to be appropriated for instream uses. Legislation adopted that year allows appropriations for two specific instream uses, recreation and fish and wildlife, but only on application by the Game and Parks Commission or a natural resource district and the protection afforded these uses is circumscribed. *See* Neb. Rev. Stat. § 46-2,107 et seq. Since enactment of this legislation, Nebraska has done nothing to secure the water Basin is required to release under the settlement agreement for the benefit of the whooping crane habitat in the Big Bend area of the Platte River.[15]

Nebraska acknowledges that the MBPP is the only significant development on the Laramie River since the decree was entered, Neb's Br. in Support of Mot. for Summ. Judg. 109-110 (March 4, 1991), Doc. No. 296, and that it has been operated in accordance with the settlement agreement. *Id.* at 112. It is undisputed that Wyoming has done nothing to interfere with the passage into the North Platte of the water Basin is obligated to release from Grayrocks under the agreement. Second Int. Rep. 65-67 & n.88. All that Nebraska now charges against Wyoming is that Wyoming continues to adhere to the legal position that Nebraska has no claim on the waters of the Laramie above its mouth.

tempting to reopen the decree in this case, the undertaking of the special master to award her "equitable" points on the basis of "[Wyoming's] lack of participation in the Grayrocks proceedings," Second Int. Rep. 68-69, is surely to stand equity on its head.

[15] This, of course, was not Nebraska's purpose in taking hostage the MBPP and extracting the settlement agreement from Basin. The whooping crane habitat is in the Big Bend area of the Platte River some 300 miles downstream from Tri-State on the North Platte. Between Tri-State and the Big Bend are the intended beneficiaries of Nebraska's attack on the MBPP, Kingsley Dam and Lake McConaughy, whose operations completely alter the character of the river below.

Most importantly, Nebraska has abandoned her contention that the operation of Grayrocks constitutes a violation of the decree. She now says that her claim is not that the operation of Grayrocks in compliance with the settlement agreement violates her rights under the decree but, rather, that the refusal of Wyoming to recognize that she has any rights to Laramie water does. *Id. But this is not the claim set forth in her petition* and Wyoming is clearly entitled to summary judgment dismissing the claim that is in fact set forth in Nebraska's petition, namely, that Wyoming is violating her rights under the decree by "[d]epleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River."[16]

2. Wyoming is entitled to summary judgement dismissing Nebraska's claim that the proposed Corn Creek project violates her rights under the decree.

The subject of paragraph 3.b of Nebraska's petition is the Corn Creek project. As the special master states: "The 1978 Settlement Agreement also sets

[16] Neb's Petition ¶ 3.a. The special master's statement is in error that, "[i]n her petition, Nebraska alleges that Wyoming unlawfully is depleting and threatening to deplete the flows of the North Platte River *by her intended administration of Grayrocks Reservoir's operation and releases on the Laramie River*." Second Int. Rep. 5 (emphasis supplied); *see also id.* at 17. Nebraska alleges no such thing and the special master is wrong to indulge her undertaking to alter this claim from that the Court granted her leave to file.

forth a method for handling future depletions caused by the operation of Corn Creek, with Basin and Nebraska agreeing to bear the burden of the depletions evenly." Second Int. Rep. 69 & n.93. It being undisputed that the settlement agreement makes provision for the diversion and use of Laramie water by the Corn Creek project, should it ever by built, Wyoming is entitled to summary judgment dismissing Nebraska's claim that Wyoming is violating Nebraska's rights under the decree by "[d]epleting the natural flows of the North Platte River by the proposed construction [of the project]."

The need lately perceived by the special master to consider whether the parties were laboring under a mutual mistake of fact about return flows when they entered into the settlement agreement, and whether the operation of the project would "disturb the delicate balance of the North Platte River," Second Int. Rep. 71, simply does not exist.

The special master's conjecture that, in negotiating the settlement agreement, the parties may have proceeded under some mutual misunderstanding about return flows, is founded on an eavesdropper's construction of a second party's conversation with a third party who was relaying hearsay. Second Int. Rep. 70-71 & nn.94, 95. Previously, no party to the settlement agreement had ever suggested, in these proceedings or elsewhere, that there might have been such a misunderstanding. This "issue" is a phantom conjured by Nebraska's counsel after the strike of the eleventh hour to which the special master would now give substance. The record is clear that, in formulating the settlement agreement, the parties assumed that the diversions for the Corn Creek project for which

it provides would be totally lost to the river (*i.e.*, that there would be no return flows from the diversions).[17]

In any event, the settlement agreement could not be reformed nor the effectiveness of its provisions altered in this proceeding, even if it were shown that a misunderstanding existed. This could be done only in the proceeding in which the settlement was entered. By direction of the court of appeals, the settlement court expressly retains jurisdiction over the agreement. *See supra* note 11, orders of court of appeals and district court, Appendix to Wyo's Br. in Opposition at A-33, A-35, Doc. No. 2.

It has been shown and is undisputed that the Corn Creek project has no Wyoming water rights, no contract with the Bureau of Reclamation for water from the Glendo reservoir (which would be essential), no 404 permit from the Corps of Engineers, and no arrangements for financing. Wyo's First Mot. for

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[17] Following execution of the settlement agreement, John W. Neuberger, Nebraska's then Director of Natural Resources and one of her negotiators, prepared an analysis of its effects on Laramie flows. This analysis demonstrates that the settlement agreement was concluded with the understanding that all of the diversions it provides for the MBPP and the Corn Creek project would be totally consumed. Basin's Memo. in Support of Wyo's Second Mot. for Summ. Judg., App. A (Grahl affidavit), Exh. 13 (Neuberger analysis 4-6) (Feb. 28, 1991), Doc. No. 293.

The special master's statement that "the issue of return flows was apparently not expressly addressed during the [settlement] negotiations," Second Int. Rep. 71 n.95, is disingenuous. He cites in support the transcript of the hearing held on March 9, 1992, pp. 100-101, Doc. Nos. 435, 442, 445. But the transcript is clear, pp. 97-101, that the reason return flows were not "expressly addressed" is because the parties to the settlement proceeded on the assumption that there wouldn't be any.

Summ. Judg. 7 (affidavit of Gordon W. Fassett ¶¶ 7-8), 31 (affidavit of Stanley Hathaway ¶ 7) (Sept. 11, 1987), Doc. No. 23; Wyo's Second Mot. for Summ. Judg. (second affidavit of Gordon W. Fassett ¶ 6) (March 1, 1991), Doc. No. 294; Wyo's Br. in Support of Second Mot. for Summ. Judg. 51, n.17 (March 1, 1991), Doc. No. 294. Nevertheless, on the basis of a statement made in argument by Wyoming's attorney (which the special master characterizes as "testimony," Second Int. Rep. 70), by request of former Governor Hathaway of Wyoming, the principal proponent of the project, the special master appears to have concluded that "the likelihood the Corn Creek project will be developed" has been established. *Id.* To be sure, the project remains alive in the hopes of its promoters, but their hankering can hardly be taken as indicative of its vitality, much less of its imminence, in the face of the undisputed evidence that it has never got off the drawing board.

At the more fundamental level, however, given that Nebraska is party to an agreement making provision for the operation of the Corn Creek project, should it materialize, it is wholly immaterial whether development of the project is imminent or improbable. Wyoming is entitled to summary judgment dismissing this claim whether Corn Creek is far fetched or far along.

3. Wyoming and Colorado are entitled to summary judgment that the water of the Laramie River is wholly apportioned between them and that Nebraska has no entitlement to such water.

Whether the Laramie is completely apportioned between Colorado and Wyoming by the decree in *Wyoming v. Colorado*[18] and whether Nebraska has any claim to Laramie water under the decree in the instant case[19] are issues strictly of law. They do not involve any facts and must be determined in reference to the decrees and opinions of the Court.[20] Clearly, the Court and Special Master Doherty deemed all of the waters of the Laramie to have been previously apportioned in *Wyoming v. Colorado* and, necessarily, to have been excluded from consideration in this case. Thus, the toing-and-froing of Special Master Olpin about Special Master Doherty's assumption that there would be some inflows into the North Platte from the Laramie and about the failure of the Court and Special Master Doherty, as Special Master Olpin sees it, "to have delved into the fate of [Laramie] waters

[18] 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *decree vacated and replaced*, 353 U.S. 953 (1957).

[19] It is undisputed that Laramie water that actually reaches the North Platte is subject to division as provided in paragraphs IV and V of the decree. It is also undisputed that Nebraska is entitled to return flows below Tri-State from the diversions she is entitled to make above Tri-State.

[20] The special master's characterization of the record in the proceedings before Special Master Doherty as "material facts" in this proceeding, Second Int. Rep. 11, though curious, would probably be innocuous so long as it were understood that material below the level of that authored by the Court cannot be employed to impeach the plain language of the Court or to create ambiguity where the Court is clear. But the special master acknowledges that he "probe[d] beyond," *id.* at 14, the plain language of the Court's opinions and decrees (which he discounts as "facially persuasive," *id.* at 39, and "superficial[ly] plain-meaning," *id.* at 44) in reaching his conclusions that the Laramie is not completely apportioned between Colorado and Wyoming by the decree in *Wyoming v. Colorado* and that Nebraska has "equities" in the Laramie under the decree here.

in excess of dependable flows," Second Int. Rep. 64, is immaterial. The facts, which Special Master Olpin acknowledges, that no Laramie water was apportioned in this case, that no restrictions were placed on Wyoming's use of such water, and that Nebraska was accorded no rights to such water, *see, e.g.*, Second Int. Rep. 40, 46, 59, 60-61, are not attributable to any failure on the part of the Court or Special Master Doherty "to have delved into the [subject of Laramie waters]," but to their conviction that all of the waters of the Laramie had been apportioned previously between Colorado and Wyoming.[21]

The decree in *Wyoming v. Colorado*, 353 U.S. 953 (1957), provides:

> The State of Wyoming, or anyone recognized by her as duly entitled thereto, shall have the right to divert and use all water flowing and remaining in the Laramie river and its tributaries after such diversion and use [as the decree provides for] in Colorado.

As it stands, this decree is definitive and controlling of the rights of Colorado and Wyoming. The special master's disregard of it, Second Int. Rep. 39, n.58, is impermissible. His cavalier treatment of it stems

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[21] Notwithstanding the special master's fondness for characterizing Wyoming's position as being that she has the right to "dewater the Laramie" at its mouth, Second Int. Rep. 17; *see also id.* at 36 & n.55, 39, 40, 64, there is no real issue underlying this hyperbole. It is established that, except for the MBPP (Grayrocks), there have been no significant developments on the Laramie since the decree was entered in 1945. The operations of both the MBPP and Corn Creek, should the latter materialize, are covered by the settlement agreement and Wyoming has done nothing to interfere with its execution.

from his erroneous theses that Nebraska is entitled to contributions from the Laramie under the decree here and that the Court overlooked this.[22]

Early in the opinion in *Nebraska v. Wyoming* the Court notes that Colorado "prayed for an equitable apportionment [of the waters of the North Platte] between the three states, *excluding only the tributary waters of the South Platte and Laramie rivers.*" 325 U.S. at 592 (emphasis supplied). The Court then says:

> The waters of the South Platte and the Laramie were previously apportioned—the former between Colorado and Nebraska by compact . . . , the latter between Colorado and Wyoming by decree. *Wyoming v. Colorado*, 259 U.S. 496. Those apportionments are in no way affected by the decree in this case.

Id. n.1.

Both the context and the use of the definite article "the" before "waters" make clear that the Court

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[22] There is absolutely no basis for the special master's supposition that the Court was ignorant of the decree in this case when it entered the decree in *Wyoming v. Colorado* in 1957. Side-by-side examination at that time of the 1922 decree in *Wyoming v. Colorado* and of the 1945 decree in this case (as modified in 1953) would have satisfied the reviewer that the Laramie was completely apportioned between Colorado and Wyoming in 1922 and that Nebraska obtained no entitlement to Laramie water under the decree here. In 1936, the Court, after specifying Colorado's rights in the Laramie, stated that the 1922 decree "confirms and establishes the right of the State of Wyoming and her water claimants to receive and divert within that State the remaining waters of the stream and its tributaries." *Wyoming v. Colorado*, 298 U.S. 573, 578 (1936).

means "all of the waters" of the South Platte and the Laramie Rivers. The Court's treatment in tandem of the effects of the decree in *Wyoming v. Colorado* and of the compact between Colorado and Nebraska demonstrates that the Court regarded the former as having apportioned the waters of the Laramie between Colorado and Wyoming as completely as the latter apportioned the waters of the South Platte between Colorado and Nebraska. This is confirmed by paragraph XII of the decree:

> This decree shall not affect:
>
> * * *
>
> (d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of *the waters* of the Laramie River, a tributary of the North Platte;
>
> (e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning *the water* of the South Platte River.

325 U.S. at 671 (emphasis supplied).

After observing that "*the water* of the Laramie River was equitably distributed by the decision of this Court in the case of *Wyoming v. Colorado*, . . . and that the South Platte River was equitably distributed by compact between Nebraska ratified by the Congress in 1926," Special Master Doherty stated: "This conclusion takes into account the interests of all parties and *no redistribution of the waters of those rivers should be undertaken in this suit.*" Report of Special Master Doherty 8 (emphasis supplied). He began his recommendations for the decree by stating that they

embraced the "water of the North Platte River and its tributaries, *except the Laramie River.*" *Id.* at 177 (emphasis supplied).[23]

With all due respect, Special Master Olpin's speculations that, in formulating the decree here, the Court and Special Master Doherty proceeded "on a supposition that ultimately was not carefully examined" and "failed to examine the Laramie Decree exhaustively," Second Int. Rep. 59-60, so that their intention "remains murky," *id.* at 39, and a "crisp resolution" of the status of the waters of the Laramie eluded them, *id.* at 38, are an overlong fetch. The Court and Special Master Doherty could hardly have made more plain that they regarded "*the waters*" of the Laramie as having been apportioned previously between Colorado and Wyoming, that the Laramie was excluded from this case, and that the decree here was not to affect in any way the division previously made of all of the waters of the Laramie between Colorado and Wyoming.

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[23] Special Master Olpin's suggestion that the Court's failure to repeat Special Master Doherty's introductory language verbatim may signal that it was reluctant to wholly exclude the Laramie from the decree, Second Int. Rep. 49, is beyond credulity's pale. Not only did the Court use equivalent language in its opinion and the decree but, in adopting the substance of Special Master Doherty's recommendations, the Court surely would have said something had it not agreed with the exclusion of the Laramie. Also bereft of persuasive force is the special master's undertaking to explain away the fact that Special Master Doherty, Doherty Report 20, and the Court, 325 U.S. at 592, n.2, excluded the entire Laramie River basin from the portion of the North Platte River basin they deemed involved in the case. Second Int. Rep. at 46 & n.66.

The special master predicates his refusal to give effect to the plain language of the Court in the two cases, and his proposition that Nebraska has "equities" in Laramie water, *id.* at 64, solely on the circumstances that Special Master Doherty, in estimating the quantity of natural flow water that would be available in the Whalen to Tri-State section of the North Platte, assumed that there would be some inflows from the Laramie, and that there have been such inflows since the decree was entered. *See, e.g., id.* at 48, 59, 63. But, in the face of the plain language of the decrees and opinions of the Court to the contrary, it is a jump too far from Special Master Doherty's assumption that there would be some inflows into the North Platte from the Laramie to Special Master Olpin's conclusion that Nebraska therefore has rights or equities in the waters of the Laramie.[24]

Wyoming and Colorado are entitled to summary judgment, as a matter of law, that all of the waters of the Laramie River are apportioned between them.

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[24] *Cf. Oklahoma v. New Mexico*, 115 L. Ed. 2d 207, 111 S. Ct. 2281 (1991), involving the issue of whether, under the Canadian River Compact, New Mexico's unrestricted right to use water originating above Conchas Dam continued to apply to upriver water that passed the dam into the river below. New Mexico's right to use water originating below the dam was subject to restrictions. Although the Court held that upriver water passing Conchas should be treated as water originating below the dam, it observed that the fact that flows past Conchas of some water entering the river above had been assumed in determining the supplies that would be available for downstream projects in Texas and Oklahoma, would not "prevent New Mexico from simply enlarging Conchas Reservoir to capture all the waters flowing into the river above Conchas Dam." 115 L. Ed. 2d at 226.

4. Wyoming and Colorado are entitled to summary judgment that Nebraska has no right to natural flows of the North Platte above Tri-State, except such as she is entitled to divert at or above Tri-State in accordance with paragraph V of the decree into the canals listed in paragraph IV for the irrigation of land thereunder.

The issue of Nebraska's rights to natural flows of the river above Tri-State Dam, like the issue of her rights to waters of the Laramie, is an issue strictly of law that must be determined in reference to the decree and opinion of the Court. Wyoming and Colorado are entitled to have Nebraska's rights defined before being required to proceed further. They seek determination that Nebraska has no entitlement to natural flows of the river above Tri-State for use below, except such as she is entitled to divert under paragraph V of the decree into the canals specified in paragraph IV for the irrigation of lands thereunder. Her entitlement to divert and use water in accordance with these provisions of the decree is undisputed, as is her entitlement to return flows below Tri-State from the water she is entitled to divert above.

Nebraska contends that she has "equities," which she variously bases on the "regimen of the river" and the "predicate of the decree", that entitle her to use natural flows of the river above Tri-State for purposes other than those specified in the decree. The special master refuses to decide whether she has any such entitlement because he sees "reason to proceed cautiously until Nebraska has developed her factual case." Second Int. Rep. 94.

The issue, however, is not of fact but of law. No facts that might now be shown can define or affect

whatever rights Nebraska has under the existing decree. Whatever they are, they are, and there is nothing that can be looked to now to determine what they are that is not in the record of the original proceedings, which has been before the special master for many months. Wyoming and Colorado are entitled to a decision. *Oklahoma v. New Mexico*, 115 L. Ed. 2d at 228-29.

Given that Nebraska's case is essentially based on the proposition that she has rights, in addition to those specified in paragraphs IV and V of the decree, to natural flows of the North Platte in the river above Tri-State for diversion and use below, the special master's suggestion that, to rule on the issue now, "would be to issue an advisory opinion," Second Int. Rep. 94, is inexplicable.

At some point, the plain language of the decrees and opinions of the Court in *Wyoming v. Colorado* and this case must be honored and given effect. The decisions of the Court are clear that Nebraska has no claim on Laramie water and that, except as provided by paragraphs IV and V of the decree, she has no entitlement to natural flow water from above Tri-State for use below, *see* 325 U.S. at 607, 654-55. Wyoming and Colorado are entitled to summary judgment to that effect.

CONCLUSION

Basin requests that its exceptions be granted and judgment entered accordingly.

Respectfully submitted,

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